

Bond Agreement Excavation Completion (Escrow Form)

THIS BOND AGREEMENT (this “*Agreement*”) is made and entered into effective _____, 2018, by and between **MILLCREEK**, a municipal corporation of the State of Utah, whose address is 3330 South 1300 East, Millcreek, Utah 84107 (the “*City*”), and the undersigned, (referred to in this Agreement as “*Contractor*”).

RECITALS :

A. Contractor proposes to dig or excavate in a City right-of way in the location (the “*Location*”) that is described on exhibit “A” annexed hereto.

B. Contractor has filed, or will soon file, a request for a permit (the “*Application*”) with the City for approval to dig or excavate in a City right-of-way.

C. The City is willing to permit the Contractor to dig or excavate in a City right-of-way conditioned on Contractor’s promise to restore the City right-of-way and on Contractor’s deposit into an escrow controlled by Escrow Agent of the estimated cost of the Restoration (defined below) as described on exhibit “B” annexed hereto.

D. The parties intend to set forth herein their entire agreement regarding the Restoration and to supersede hereby and to consolidate herein all their prior negotiations and agreements, whether oral or written, regarding the same.

AGREEMENT :

NOW, THEREFORE, in consideration of the recitals above, the mutual covenants and undertakings of the parties hereto, and for other good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

Section 1. **Contractor’s Completion and Warranty Obligations.** Contractor irrevocably acknowledges its obligation to restore (“*Restoration*”) the City right-of-way in the Location without cost to the City and hereby agrees to satisfactorily complete the installation of the Restoration in a good, workmanlike, lien-free manner. For purposed hereof Restoration shall mean restoration of the right-of-way as described in and pursuant to City ordinances and standards. Further, Contractor hereby warrants that the Restoration will be free of defects (poor workmanship or materials and normal wear and tear excepted) for a period of three (3) years after all the Restorations have been installed and finally accepted by the City (the “*Warranty*”).

Section 2. **Repairs.** Contractor and the City agree that all responsibility for repair and maintenance of the Restoration remains with Contractor until all the Restoration has been installed and finally accepted by the City (the Restoration and acceptance by the City collectively, “*Restoration/Acceptance*”) and the Warranty has expired.

Section 3. **Deposit.** To assure and guarantee (a) the satisfactory and timely Restoration/Acceptance of the Improvements, and (b) the Warranty (all as provided in Section 1 above), contemporaneously herewith Developer shall deposit into a segregated escrow account (the "Escrow") controlled by Escrow Agent for the amount and in the sum of \$ _____ (the "Deposit"), which is the estimated cost of the Restoration as set forth in exhibit "B." Contractor shall pay all escrow fees and other charges charged by Escrow Agent in connection with the Escrow. Escrow Agent hereby acknowledges the Deposit and the establishment of the Escrow and hereby irrevocably agrees to hold and disburse the Deposit only in accordance with the express terms of this Agreement.

Section 4. **Assignment of Deposit.** Contractor hereby assigns, transfers, and sets over to the City all of Contractor's right, title, and interest in and to the full proceeds of the Deposit and also hereby assigns, transfers, and sets over to the City the right to use the Deposit in the event of any default or noncompliance in the performance for which this bond is posted and filed.

Section 5. **Release of Deposit.** If Restoration has been constructed to the reasonable satisfaction of the City, then the City will release ninety percent (90%) of the Deposit that is associated with the Restoration. Further, if three (3) years after final Installation/Acceptance of the and the Restorations are then free of defects, normal wear and tear excepted, the City will release the remaining amount of the Deposit.

Section 6. **Failure to Install Restoration/Failure of Warranty.** If (a) Restoration/Acceptance of the Restoration has not occurred within the time period set forth in the permit, or (b) the installed Restoration is not free of defects for three (3) years after final acceptance by the City, then the City may unilaterally (without consent or approval of any kind from Contractor) at any time thereafter use the Deposit (full or any amount). The City shall be deemed fully authorized (without further action or notice whatsoever) to use as much of the Deposit as is required (in the City's sole opinion) to satisfactorily complete installation of the Restoration and/or to repair any defects therein, including (without limitation) the cost of any and all incidental construction, legal, administrative, or engineering fees or expenses incurred by the City to effect such work. Any balance of the Deposit remaining after payment of all such costs, fees, and expenses, and a reasonable reserve, in an amount determined by the City, shall be refunded to Contractor.

Section 7. **No Waiver or Estoppel.** This Agreement is irrevocable unless revoked by the mutual consent of Contractor and the City. Neither this Agreement nor deposit of the referenced escrow by Contractor and the acceptance of the Deposit or this Agreement by the City shall constitute a waiver or estoppel by or against the City concerning the Restoration, nor shall any such matters in any way relieve Contractor from the obligations to (a) timely achieve satisfactory Installation/Acceptance of the Restoration or (b) fully perform under the Warranty, regardless of whether or not the Deposit is adequate to pay for the satisfactory Installation/Acceptance of the Restoration or the satisfactory fulfillment of the Warranty. If the Deposit is inadequate to pay for the cost of Restoration for whatever reason, Contractor agrees to pay such deficiency independent of this Agreement, which amount may include all incidental construction, legal, administrative, or engineering fees or expenses incurred by the City to affect

such work. Additionally, no further permits or approvals shall be issued to the Contractor until such deficiency is cured.

Section 8. **Inspection.** The City shall have the right to inspect Restoration during construction. If Restorations involves underground Restoration, then the Contractor shall notify the City in writing when underground Restoration are ready to be backfilled and agrees not to backfill such trenches or excavations until such underground improvements have been inspected by the City.

Section 9. **General Provisions.** The following provisions are also an integral part of this Agreement:

(a) **Binding Agreement.** This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the respective parties hereto.

(b) **Captions.** The headings used in this Agreement are inserted for reference purposes only and shall not be deemed to define, limit, extend, describe, or affect in any way the meaning, scope, or interpretation of any of the terms or provisions of this Agreement or the intent hereof.

(c) **Counterparts.** This Agreement may be signed in any number of counterparts with the same effect as if the signatures upon any counterpart were upon the same instrument. All signed counterparts shall be deemed to be one original.

(d) **Severability.** The provisions of this Agreement are severable, and should any provision hereof be void, voidable, unenforceable, or invalid, such void, voidable, unenforceable, or invalid provision shall not affect the other provisions of this Agreement.

(e) **Waiver of Breach.** Any waiver by either party of any breach of any kind or character whatsoever by the other, whether such be direct or implied, shall not be construed as a continuing waiver of, or consent to, any subsequent breach of this Agreement.

(f) **Cumulative Remedies.** The rights and remedies of the parties hereto shall be construed cumulatively, and none of the rights and remedies shall be exclusive of, in lieu of, or a limitation of any other right, remedy, or priority allowed by law.

(g) **Amendment.** This Agreement may not be modified, except by an instrument in writing signed by the parties hereto.

(h) **Interpretation.** This Agreement shall be interpreted, construed, and enforced according to the substantive laws of the state of Utah.

(i) **Attorneys' Fees.** In the event any action or proceeding is brought by either party regarding this Agreement, the prevailing party shall be entitled to recover its costs, expert witness fees, and reasonable attorneys' fees, whether such sums are expended with or without suit,

at trial, or on appeal.

(j) Notice. Any notice or other communication required or permitted to be given hereunder shall be deemed to have been received (a) upon personal delivery or actual receipt thereof or (b) within two (2) days after such notice is deposited in the United States mail, postage prepaid, certified, and addressed to the respective addresses set forth herein or to such other address(es) as may be supplied by a party to the other from time to time in writing.

(k) Time of Essence. Time is of the essence of this Agreement.

(l) Assignment. Contractor may not assign or otherwise convey its rights or delegate its duties under this Agreement without the express written consent of the City.

(m) No Partnership. The City and Contractor do not by this Agreement in any way or for any purpose become partners or joint ventures with each other.

(n) Benefit of Agreement. The benefits and protection provided by this Agreement shall inure solely to the City. The City shall not be liable for any claim or obligation of Contractor. City may, in its sole and absolute discretion, interplead the Deposit (full or any amount thereof) with a court pursuant to Utah R. Civ. P. 67 and Utah Code Ann. § 76-27-4.

(o) Exhibits. All exhibits annexed to this Agreement are expressly made a part of this Agreement as though completely set forth herein. All references to this Agreement, either in this Agreement itself or in any such writings, shall be deemed to refer to and include the Agreement and all exhibits and writings.

DATED effective the date first above written.

CONTRACTOR:

By: _____

Printed Name: _____

Its: _____

Address: _____

The Escrow Agent hereby acknowledges that there are funds in the amount of \$_____ that have been set aside pursuant to this Agreement for payment of the Improvements, and Escrow Agent agrees to hold such funds in trust and dispose of such funds strictly in accordance with the terms and conditions of this Agreement.

ESCROW AGENT:

Name of Escrow Agent: _____
(Print Name of Escrow Agent)

By: _____
Printed Name: _____
Its: _____
Address: _____

CITY: MILLCREEK

ATTEST:

By: _____
Elyse Greiner, CMC, City Recorder

By: _____
Jeff Silvestrini, Mayor

Exhibit “A”

**to Bond Agreement for
Completion of Proposed Restoration**

[description of location]

Exhibit “B”

**to Bond Agreement for
Completion of Proposed Restoration**

[Engineer’s estimate of Restoration cost]